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No. 05-6551

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In The
Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Blakely v. *Washington*, 542 U.S. 296 (2004), precludes an enhanced sentence above that authorized by the jury verdict alone, based on a fact (other than a prior conviction) neither found at trial nor admitted by the defendant. *United States* v. *Booker*, 543 U.S. 220 (2005), allows a sentence within the authorized range based on judicial factfinding, notwithstanding a reasonableness requirement that constrains the sentencing court's exercise of discretion within that authorized range.

The question presented is whether California's authorization of an upper term based on the jury verdict alone, subject to the requirement that the upper term be reasonable, is *Blakely*-compliant in light of *Booker*.

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STATEMENT OF THE CASE

1. During 2000, ten-year-old John Doe repeatedly was subjected to forcible sodomy and oral copulation by petitioner, Doe's father and a longtime police officer. J.A. 27-28; Reporter's Transcript (R.T.) 486-87. In December, despite petitioner's threat to kill Doe if he revealed the abuse, Doe told a cousin and an aunt. J.A. 28-29; R.T. 66, 70. Petitioner confronted Doe, saying, "In a week you better say you are lying or else I am going to f— you up." J.A. 29. Nevertheless, Doe detailed petitioner's abuse to police and testified to it at trial. J.A. 28-29.

When interviewed by authorities, petitioner denied sexual contact with Doe, but later in the interview said his penis once was in Doe's mouth for five seconds in the shower. J.A. 29-30; R.T. 248. Petitioner indicated Doe was homosexual and had to be stopped from orally copulating petitioner. J.A. 30; R.T. 250; People's Trial Exhibit 7 (Ex. 7) at 25-33. Petitioner also asserted that one time he had to fend off Doe who tried to hold petitioner's penis as petitioner dressed. R.T. 248; Ex. 7 at 33-35. At trial, petitioner denied sexual acts on children and maintained that Doe was the aggressor in the shower incident. J.A. 30; R.T. 553-59, 574-78.

2. The jury convicted petitioner of continuous sexual abuse of a child under the age of 14, J.A. 27, a crime punishable with imprisonment for six, twelve, or sixteen years under California Penal Code section 288.5.[1] At sentencing, the trial court considered a probation officer's report, psychological evaluations of petitioner, letters and

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[1] The relevant provisions of California Penal Code sections 288.5 and 1170(b), and of California Rules of Court 4.408, 4.409, 4.410, 4.420, 4.421, and 4.423 are set forth in the appendix to this brief.

statements of various persons, and memoranda and arguments of the parties. J.A. 6-20, 42. After denying probation, J.A. 20-21, the court identified six aggravating factors: (1) the crime involved great violence and a threat of great bodily harm, disclosing a high degree of viciousness and callousness; (2) the victim was particularly vulnerable; (3) petitioner threatened to inflict bodily injury upon the victim in attempting to coerce the victim to recant; (4) petitioner took advantage of a position of trust; (5) petitioner's violent conduct indicated a serious danger to the community; and (6) petitioner as a peace officer violated his duty to serve the community which included the victim, J.A. 22-23, 42. It found mitigation in petitioner's lack of prior criminal conduct. J.A. 22, 42. Concluding that aggravation outweighed mitigation, and further finding that sentencing objectives of societal protection, punishment, deterrence, and isolation applied, the court imposed the sixteen-year upper term. J.A. 23.

3. On appeal, the California Court of Appeal decided that Doe's vulnerability and petitioner's abuse of trust constituted one aggravating factor under state law. J.A. 43-44. The court did not resolve petitioner's other challenges to the aggravating factors identified by the trial court, concluding that petitioner's abuse of a position of trust, coupled with his threats and violent conduct indicating the serious danger he posed to society, were more than sufficient to justify the upper term even assuming no other aggravating factors applied. J.A. 44-46. It held that remand for reconsideration of the sentencing decision was unnecessary because there was no reasonable probability a lesser sentence would be imposed in light of those two factors. J.A. 51. The court rejected petitioner's claim that the sentence violated *Blakely* v. *Washington*, 542 U.S. 296 (2004), holding that the upper term was within the authorized range of

punishment based on the jury verdict alone. J.A. 47. A dissenting justice found *Blakely* violated because the judge, not the jury, found the aggravating circumstances. J.A. 48-50.

4. On June 20, 2005, the California Supreme Court decided *People* v. *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005), holding that California's determinate sentencing system complied with *Blakely* and *Booker*. Nine days later, the California Supreme Court denied review in this case "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*[, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005)] regarding the effect of *Blakely v. Washington*[, 542 U.S. 296 (2004)], and *United States v. Booker*[, 543 U.S. 220 (2005)], on California law." Petitioner was entitled to no relief when *Black* became final on July 20, 2005, see Cal. R. Ct. 29.4(b)(1), as there was no change in *Black*'s holding that upper term sentences, such as petitioner's, did not violate the constitutional rule of *Blakely* and *Booker*.

SUMMARY OF ARGUMENT

California's sentencing law avoids the constitutional problems identified in *Apprendi* v. *New Jersey*, *Blakely* v. *Washington*, and *United States* v. *Booker*. Under those precedents, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." California's sentencing system comports with this Court's jurisprudence because it restricts judicial factfinding to

discretionary sentencing choices within the base range authorized by the finding of guilt. Indeed, it provides for review of those choices for reasonableness in a manner this Court has endorsed as ensuring the constitutionality of the Federal Sentencing Guidelines.

California's sentencing system sets out each felony offense's specific base sentencing range as comprising a lower, middle, and upper term. As the California Supreme Court authoritatively explained in *People* v. *Black*, the trial court legally is authorized to impose any of the three terms in the base range based on a verdict of guilt alone. In California's system, then, the upper term of the base range is the statutory maximum for the underlying crime. Judicial factfinding is restricted to the function of merely selecting an appropriate term within the offense-specific base range. For a judge to exceed the base range—for example, by employing an "enhancement" or an alternative sentencing scheme—the predicate fact for the enhancement or alternative scheme must be pleaded and proved to a jury beyond a reasonable doubt. The historical roles of the judge and the jury are preserved.

The constitutionality of the California system is confirmed rather than undermined by the fact that the trial court's discretion in selecting among the three base-range terms is subject to the constraint, set out in California Penal Code section 1170(b), that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Section 1170(b) is not a threshold requirement that renders an upper term sentence unauthorized in the absence of judicial factfinding beyond the verdict alone. Instead, section 1170(b) is a reasonableness constraint on the court's selection of a term within the base range after the court has considered all of the relevant circumstances

relating to the offense and offender. The court's selection of a sentence within the base range is reviewed for abuse of discretion. In this way, section 1170(b) operates like the reforms this Court adopted in *Booker*.

As recognized in *Booker*, a threshold factfinding requirement that must be satisfied before a court legally can impose a particular sentence is fundamentally different from a reasonableness requirement that only constrains the court's selection of a particular available sentence after balancing relevant considerations. The former implicates the statutory maximum as a substantive limitation on the court's authority to reach a particular sentence. The latter does not implicate the statutory maximum, even if tied to the presence or absence of aggravating factors in a particular case. Imposing a reasonableness constraint on the court's selection of a term based on the circumstances of the case does not reduce the maximum term legally available based on the verdict alone. Consequently, section 1170(b) does not alter the legal availability of the upper term for constitutional purposes in determining the statutory maximum.

ARGUMENT

PETITIONER'S UPPER TERM SENTENCE DOES NOT EXCEED THE STATUTORY MAXIMUM FOR SIXTH AND FOURTEENTH AMENDMENT PURPOSES BECAUSE UNDER CALIFORNIA'S DETERMINATE SENTENCING SYSTEM THE ENTIRE CRIME-SPECIFIC BASE RANGE IS LEGALLY AUTHORIZED BY THE JURY VERDICT ALONE SUBJECT ONLY TO A REASONABLENESS REQUIREMENT

Petitioner asserts that California's determinate sentencing law identifies the midterm as the presumptive sentence yet allows the trial court to impose an upper

term based on aggravating circumstances not found true by a jury. This, he claims, violates the Sixth and Fourteenth Amendments as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004). Petitioner's argument ignores the California Supreme Court's authoritative construction of the determinate sentencing law as explained in *People* v. *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005). He also overlooks the constitutional equivalency of California's sentencing system and the reformed Federal Guidelines system validated in *United States* v. *Booker*, 543 U.S. 220 (2005).

California preserves the constitutional role of the jury in conducting factfinding for sentencing above the statutory maximum, while permitting the judge to conduct factfinding within an offense-specific base range consisting of a lower, middle, and upper term. State law defines a fixed base range for each offense and separately defines enhancements or departures forming alternative sentence schemes based on enhancing conduct. California requires that any fact necessary to enhance or depart from the offense-specific base range be proved to a jury beyond a reasonable doubt. But the verdict authorizes any term within the base range so long as the court's choice is reasonable in light of all relevant circumstances.

California Penal Code section 1170(b) recognizes that the upper term is unreasonable and an abuse of discretion absent aggravation of the crime. Its reasonableness requirement does not render judicial factfinding in selecting the upper term unconstitutional. *Booker* reflects that a reasonableness constraint, such as section 1170(b), does not make an aggravated term legally unavailable in the absence of additional factfinding beyond the elements found by the jury. Consequently, petitioner's upper term

sentence does not violate the Sixth and Fourteenth Amendments.

A. California's Determinate Sentencing Scheme Restricts Judicial Factfinding To Discretionary Sentencing Choices Within The Offense-Specific Statutory Base Range

1. In 1977, California adopted a determinate sentencing system after concluding that its indeterminate scheme was unpredictable and lacked assurances of uniformity in sentencing. *Black*, 35 Cal. 4th at 1246, 113 P.3d at 537, 29 Cal. Rptr. 3d at 743. The State enacted a system of base ranges and departure statutes to achieve felony sentences "'in proportion to the seriousness of the offenses as determined by the Legislature to be imposed by the court *with specified discretion.*'" *Id.* (quoting Cal. Penal Code § 1170(a)(1)).

California's system makes nearly every noncapital felony offense punishable by a base-range triad of fixed terms specified by one of two methods.[2] For numerous felonies, the legislature has identified the specific triad deemed commensurate with the seriousness of the offense. See, *e.g.*, Cal. Penal Code § 213 (establishing base ranges of "two, three, or five years" for second degree robbery, and "three, four, or six years" for first degree robbery). If no triad is specified, a catch-all provision in California Penal Code section 18 applies, under which the offense "is punishable by imprisonment in any of the state prisons for 16 months, or two or three years."

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[2] The most serious offenses in California carry indeterminate life terms with minimum parole eligibility dates. See, *e.g.*, Cal. Penal Code §§ 187, 190 (murder).

Statutory "enhancements" add terms onto the base-range term selected by the court. Enhancements are predicated on the existence of specific facts relating to the offender (such as the defendant's criminal history), or the offense (such as the use of a firearm or other dangerous weapon, infliction of great bodily injury on the victim, the particular vulnerability of the victim, commission of the crime while released pending trial, the amount of property loss, or the quantity of drugs involved). See *Black*, 35 Cal. 4th at 1246 n.3, 113 P.3d at 537 n.3, 29 Cal. Rptr. 3d at 744 n.3.[3] Enhancements must be pleaded and proved to a jury beyond a reasonable doubt. *Id.* at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744; Cal. Penal Code § 1170.1(e).

California also enacted a limited number of alternative sentencing schemes. These move a defendant from the offense-specific base range into an enhanced sentencing base range. For example, under the "One Strike" law, if a defendant commits an enumerated sex offense under specified circumstances, such as kidnapping, binding, or the forcible administration of drugs, the applicable base punishment is a life term. Cal. Penal Code § 667.61. As with enhancements, California law requires that the facts triggering the alternate sentencing scheme be pleaded and proved to a jury beyond a reasonable doubt. See, *e.g.*, Cal.

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[3] Enhancement statutes include California Penal Code sections 667.9 and 667.10 (elderly, young, or disabled victim), 12022 (armed with a firearm and using a deadly or dangerous weapon), 12022.1 (commission of offense while released on bail or own recognizance), 12022.5-12022.55 (use or discharge of a firearm), 12022.6 (amount of property loss), 12022.7 and 12022.8 (infliction of great bodily injury), 12022.75 (administering a controlled substance against the victim's will), 12022.9 (infliction of injury on a pregnant woman, resulting in termination of the pregnancy), and California Health and Safety Code section 11370.4 (amount of controlled substance).

Penal Code § 667.61(i); *People* v. *Mancebo*, 27 Cal. 4th 735, 744-50, 41 P.3d 556, 561-65, 117 Cal. Rptr. 2d 550, 557-61 (2002).

Finally, California defines some felonies with alternative base ranges depending upon the existence of specified facts. For example, California Penal Code section 245 provides for a standard base range of "two, three, or four years" for aggravated assaults committed with a deadly weapon or by use of force likely to produce great bodily injury. *Id.* § 245(a)(1). If the defendant uses a machine gun in committing the assault, the base range is "4, 8, or 12 years." *Id.* § 245(a)(3). If the assault involves a semiautomatic firearm, the base range is "three, six, or nine years." *Id.* § 245(b). If the assault is against a police officer or firefighter engaged in the performance of his or her duties, the base range is "three, four, or five years." *Id.* § 245(c). Again, each fact that changes the base range is an element that must be proved to the jury beyond a reasonable doubt. See, *e.g.*, Judicial Council of California Criminal Jury Instructions (CALCRIM) (2006) No. 875 (defining aggravated assault including additional elements for aggravated assault with a machine gun or semiautomatic firearm), No. 860 (including additional elements for assault on a police officer or firefighter).

2. With respect to a base range, the trial court is legally authorized to impose any of the three terms based on the jury's verdict alone and is vested with the discretion to select the appropriate term in light of the defendant's conduct. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. The court "'may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further

evidence introduced at the sentencing hearing.'" *Id.* at 1248, 113 P.3d at 538-39, 29 Cal. Rptr. 3d at 745 (quoting Cal. Penal Code § 1170(b)). The court need not give reasons for imposing the middle term, but it "must state on the record the 'reasons for selecting the upper or lower term,' including 'a concise statement of the ultimate facts which the court deemed to constitute aggravation or mitigation justifying the term selected.'" *Id.* (quoting Cal. R. Ct. 4.420(e)).

In selecting an upper term, the court may not consider an element of the crime itself or an imposed enhancement, Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(c) & (d), because those are taken into account in setting the base-range triad. Aside from that, the court has considerable discretion. It may consider aggravating factors set out in the rules of court[4] and any "additional criteria reasonably related to the decision being made." Cal. R. Ct. 4.408(a); *People* v. *Brown*, 83 Cal. App. 4th 1037, 1043-44, 100 Cal. Rptr. 2d 211, 215-16 (2000). The "'circumstances' the sentencing judge may look to in aggravation or in mitigation of the crime . . . include 'practically everything which has a legitimate bearing' on the matter in issue." *People* v. *Guevara*, 88 Cal. App. 3d 86, 93, 151 Cal. Rptr. 511, 516 (1979) (citations omitted). The trial court also has broad discretion in weighing the aggravating and mitigating factors. *People* v. *Cattaneo*, 217 Cal. App. 3d 1577, 1588, 266 Cal. Rptr. 710, 716 (1990); *People* v. *Evans*, 141 Cal. App. 3d 1019, 1022, 190 Cal. Rptr. 633, 635 (1983). The court balances these factors "against each other in qualitative as

[4] California Rule of Court 4.421 enumerates typical circumstances in aggravation relating to the crime and the offender. California Rule of Court 4.423 enumerates typical circumstances in mitigation relating to the crime and the offender.

well as quantitative terms." *People* v. *Roe*, 148 Cal. App. 3d 112, 119-20, 195 Cal. Rptr. 802, 807-08 (1983); *People* v. *Oberreuter*, 204 Cal. App. 3d 884, 887, 251 Cal. Rptr. 522, 523 (1988), *disapproved on other grounds in People* v. *Walker*, 54 Cal. 3d 1013, 1022, 819 P.2d 861, 866, 1 Cal. Rptr. 2d 902, 907 (1991).

The court's discretion in selecting the term of the base range, while broad, "is guided by Penal Code section 1170, subdivision (b), which states that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744; see also Cal. R. Ct. 4.420(b) ("Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."). That limitation is not a threshold requirement that must be satisfied before the court can impose an upper term. Rather, it requires reasonableness in the trial court's exercise of discretion, *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751, implemented by the abuse of discretion standard of review, see *People* v. *Brown*, 83 Cal. App. 4th at 1044, 100 Cal. Rptr. 2d at 216; *People* v. *Roe*, 148 Cal. App. 3d at 119-20, 195 Cal. Rptr. at 807-08.

Applying an abuse of discretion standard is a means of requiring a reasonable sentence. The California Supreme Court has explained, "This [abuse of discretion] standard is deferential. But it is not empty. Although variously phrased in various decisions, it asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." *People* v. *Williams*, 17 Cal. 4th 148, 162, 948 P.2d 429, 438, 69 Cal. Rptr. 2d 917, 926 (1998); see also *People* v. *Dent*, 38 Cal. App. 4th 1726, 1731, 45 Cal. Rptr.

2d 746, 749 (1995) ("[S]entencing discretion 'is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' As such, discretion is abused when it '"exceeds the bounds of reason, all of the circumstances being considered."'") (citations omitted); *People* v. *Evans*, 141 Cal. App. 3d at 1022, 190 Cal. Rptr. at 635 ("There was no abuse of that discretion here, as the record amply supports a finding the superior court considered all relevant factors and made a reasonable decision as to their relative weight.").[5] Consequently, the requirement in section 1170(b)—that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime"—as construed and implemented by the California courts, requires that the sentencing court's decision to impose an upper or lower term must be reasonable and recognizes that the decision to impose such a term in the absence of *any* factors in aggravation or mitigation is necessarily unreasonable. *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751.

3. Petitioner cannot plausibly argue, as was the case in *Apprendi* and *Blakely*, that his sentence represents an upward departure from the appropriate base range. California provides for jury trials for upward departures

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[5] The federal courts have likewise equated reasonableness review with review for an abuse of discretion. See, *e.g.*, *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (explaining reasonableness review "is akin to review for abuse of discretion"); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir. 2006); *United States* v. *Lazenby*, 439 F.3d 928, 931-32 (8th Cir. 2006).

through enhancements or alternate sentencing schemes. Petitioner also does not dispute that the Constitution permits judges to conduct factfinding in imposing a sentence within the standard range for the offense.

Instead, petitioner attacks California's triad base-range system itself. Under *Apprendi* and *Blakely*, he argues that the "presumptive" midterm effectively constitutes a singular base term with the upper and lower terms acting as departure terms. To petitioner, the base range can *only be* the midterm, when actually the base range is the triad with all three terms available to the trial court based on the jury verdict alone. His challenge to California's triad base-range scheme fundamentally misinterprets not only the constraint imposed on the trial court's discretion by section 1170(b), but also the constitutional implications of that constraint under *Blakely* and *Booker*. As *Black* explained, section 1170(b) merely sets out a reasonableness constraint on the discretionary choice between three authorized sentencing options. Consequently, the upper term of the base triad is the "statutory maximum" as defined by the Sixth Amendment under *Apprendi*, *Blakely*, and *Booker*.

B. *Apprendi*, *Blakely*, And *Booker* Provide That The Statutory Maximum For Constitutional Purposes Is The Top Of The Offense-Specific Base Range That The Trial Court Is Legally Authorized To Impose, And Sentencing Based On Judicial Factfinding Is Permissible Within That Base Range

1. Under *Apprendi* v. *New Jersey*, 530 U.S. 466, a jury must determine any fact that increases the maximum sentence above the prescribed statutory maximum range for the charged offense. Such a fact is the functional

equivalent of an element of a greater offense encompassing the charged offense and the enhancement. *Id.* at 494 & n.19. *Apprendi* rejected the notion that the jury-trial right turned on how the State labels the fact, explaining that there is no distinction under the Sixth Amendment between "elements" and "sentence enhancements." *Id.* at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"); see also *id.* at 497 ("Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."); *United States* v. *Booker*, 543 U.S. at 230-31 (discussing *Apprendi*).

Apprendi explained that the imposition of an enhancement based upon judicial findings conflicted with (1) the historic linkage between punishment and the statutory definition of the crime of which the defendant was convicted and (2) the consistent limitation on judges' discretion to operate within the limits of the prescribed legal penalties. *Apprendi*, 530 U.S. at 482-83. A judge's traditional exercise of sentencing discretion "was bound by the range of sentencing options prescribed by the legislature," *id.* at 481, and the judge's role in sentencing was "constrained at its outer limits by the facts alleged in the indictment and found by the jury," *id.* at 483 n.10. A defendant had to be able to "discern from the statute of indictment what maximum punishment conviction under that statute could bring," since "punishment was, by law, tied to the offense" and judges only "exercised sentencing discretion within a legally prescribed range." *Id.* at 483 n.10; see also *id.* at 478. Thus, an enhancement violates the Sixth Amendment right to a jury trial if it allows the judge, not the jury, to determine a fact that exposes the

defendant to a penalty exceeding the "prescribed range of penalties" beyond the statutory maximum for the offense established by the jury's verdict. *Id.* at 482-83, 490.

In *Blakely* v. *Washington*, 542 U.S. 296, the Court uncoupled the definition of "statutory maximum" for Sixth Amendment purposes from the sentence identified by the legislature as the statutory maximum for an offense. The constitutional inquiry focuses squarely on what sentence the trial court was legally authorized to impose based on the jury verdict alone. *Blakely* explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (citations omitted). In concrete terms, if the legislature establishes a base range for an offense, and creates departure statutes predicated on additional findings, the "statutory maximum" for *Apprendi* purposes is the *maximum of the base range*, and any facts necessary for departing from that base range are subject to the Sixth Amendment's jury-trial requirement, regardless of the legislature's definition of the statutory maximum for state sentencing purposes (i.e., regardless of the ultimate punishment ceiling imposed for the offense, taking into account possible enhancements and departures).

2. *Blakely* and *Apprendi* also reaffirmed that the Constitution countenances judicial factfinding within the statutory range authorized by the jury's verdict. *Apprendi* observed that nothing in the common law made it "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and

offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. "[J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Id.*; see also *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Indeed, the term "sentencing factor" retains its relevance because judicial factfinding is constitutionally appropriate within a statutory base range. "[T]he term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 U.S. at 494 n.19.[6]

Under *Apprendi* and *Blakely*, a fact that permits a judge to increase a defendant's sentence above the statutorily established base range for that offense is subject to the Sixth Amendment jury-trial right. See *Blakely*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,'

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[6] This Court in *Washington* v. *Recuenco*, ___ U.S. ___, 2006 WL 1725561, at *6 (2006), noted in passing that *Apprendi* "treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt." See also *id.* (noting the Court's "recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes"). *Recuenco*, however, did not reexamine that portion of *Apprendi* reaffirming the nonelemental nature of "sentencing factors" used for conducting judicial factfinding *within* an authorized range. The Court was not confronted in *Recuenco* with the validity of within-range sentencing factors. *Recuenco*'s statement equating "sentencing factors" with elements was directed at the improper use of judicially found "sentencing factors" to impose a sentence *above* the authorized statutory maximum and does not call into question *Apprendi*'s approval of the use of sentencing factors for within-range judicial factfinding. See *Apprendi*, 530 U.S. at 494 n.19.

. . . and the judge exceeds his proper authority."); see also *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); *United States* v. *Booker*, 543 U.S. at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); cf. *id.* at 231 (explaining *Jones* v. *United States*, 526 U.S. 227, 251 n.11 (1999), foreshadowed a " 'rule requiring jury determination of facts that raise a sentencing ceiling' in state and federal sentencing guidelines systems"). Concomitantly, a system that allows the judge to make factual findings in selecting a term within an authorized range is constitutionally permissible. *Apprendi*, 530 U.S. at 481; *Blakely*, 542 U.S. at 309; *Booker*, 543 U.S. at 233.

3. At their core, *Apprendi* and *Blakely* focus on the sentence a State *legally authorizes* the trial court to impose based on the jury verdict alone. In *Apprendi*, *Ring*, *Blakely*, and *Booker*, the trial court was not legally authorized to impose the sentence it selected without an additional predicate factual determination. Under New Jersey law, the jury verdict alone in *Apprendi* authorized only a base range of five to ten years, not the twelve-year term imposed by the court. *Apprendi*, 530 U.S. at 468-70, 475. Under Arizona law, the jury verdict alone in *Ring* authorized only a life sentence as the base term, not the death sentence imposed by the court. *Ring* v. *Arizona*, 536 U.S. at 597, 602-04. Under Washington law, the jury verdict alone in *Blakely* authorized only a "standard" base range of forty-nine to fifty-three months, not the ninety-month

exceptional sentence imposed by the court. *Blakely*, 542 U.S. at 303-04. And under federal law, the jury verdict alone in *Booker* authorized only a base range of 210 months to 262 months, not the 360-month sentence imposed by the court. *Booker*, 543 U.S. at 235. The key constitutional question, then, is not what sentence the State *labels* the statutory maximum, but what base range the State makes legally available to the trial court from the verdict alone.

A State's interpretation of its sentencing law sets the base line for determining when constitutional requirements come into play to preclude judicial factfinding. See *Ring* v. *Arizona*, 536 U.S. at 597-603 (explaining that the state court's interpretation of what sentence the jury verdict alone legally allowed was "authoritative," and overturning prior approval of Arizona's capital sentencing system in light of the state court's clarification that the jury's verdict alone did not authorize a death sentence). Once state law establishes the base range legally available to the trial court from the verdict, the statutory maximum for constitutional purposes is fixed at the top of that base range. A State may not thereafter avoid the constitutional requirements that flow from the identification of the base range by labeling a higher sentence the "statutory maximum" and allowing the court to rely on additional facts to reach a sentence *greater* than the permissible base range. At the same time, the Sixth Amendment does not limit judicial factfinding in selecting a term *at or below* the maximum of the base range the State legally authorizes for the offense. Applying this analysis, California's determinate sentencing system fully satisfies Sixth Amendment requirements.

C. Under California's Determinate Sentencing Law, The Upper Term Sentence Is The Statutory Maximum For *Blakely* Purposes Because Trial Courts Are Legally Authorized To Impose That Term Based On The Jury Verdict Alone

1. California's determinate sentencing law does not suffer from the constitutional flaws identified in *Apprendi* and *Blakely*. Under state law, the trial court is legally authorized to impose any of the three terms of the base-range triad based on the jury verdict alone. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. *Black*'s holding is merely the most recent manifestation of California's longtime recognition of the constitutional distinction between permissible judicial factfinding *within* the legally available base range, and jury factfinding necessary to authorize the court to impose a sentence *above* the base range. California consistently has acknowledged that the constitutional touchstone for distinguishing between the available base range and sentence enhancements is the scope of sentencing options the trial court is legally authorized to impose based on the verdict alone. Under the State's sentencing law, judicial factfinding in selecting a term from the triad base range is permissible precisely because all three terms are legally available to the trial court based on the jury verdict on the offense alone, whereas "enhancements," which add to the base range, must be proved to a jury beyond a reasonable doubt. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753; cf. *Apprendi*, 530 U.S. at 488 n.14 (citing *Monge* v. *California*, 524 U.S. 721 (1998), as acknowledging that California provides procedural safeguards, including the right to a jury trial and proof beyond a reasonable doubt, before imposing alternate sentencing scheme even when

such protections are not constitutionally mandated under *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)).

California adopted a rule fundamentally indistinguishable from *Apprendi* in *People* v. *Hernandez*, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988), *overruled on other grounds in People* v. *King*, 5 Cal. 4th 59, 78 n.5, 851 P.2d 27, 39 n.5, 19 Cal. Rptr. 2d 233, 245 n.5 (1993). In *Hernandez*, the defendant was convicted of kidnapping and rape. At sentencing the court imposed a three-year enhancement for kidnapping committed for the purpose of rape, which had not been charged or found true by the jury beyond a reasonable doubt. *Id.* at 199, 757 P.2d at 1015, 249 Cal. Rptr. at 852. *Hernandez* rejected the claim that the factual inquiry underlying the enhancement—whether the kidnapping was "for the purposes of rape"—was nothing more than a "sentencing fact" that need not be charged or proved to the jury. Instead, *Hernandez* anticipated *Apprendi* by focusing on what sentencing options were legally available to the trial court based on the jury's verdict alone:

> In the present case, the jury's verdict simply did not make the three-year term . . . available to the sentencing judge to impose. . . . It was not one of the available punishments the court could impose as part of the sentencing package because the section's essential requirement, that the kidnapping must have been perpetrated for the purpose of committing one of the specified sex offenses, had not been established by the trier of fact.

Id. at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856; see also *id.* at 208, 757 P.2d at 1021, 249 Cal. Rptr. at 858 (holding Constitution compelled pleading and proof requirement for

any fact serving as basis for imposing a sentence not otherwise available based on jury verdict alone).

Having recognized the same rule undergirding *Apprendi* and *Blakely*—that the pleading, proof, and jury-trial requirements turned on whether the additional sentence to be imposed was legally available to the court based on the jury's verdict alone—*Hernandez* explained that factfinding for sentence enhancements differs from factfinding in selecting a term from the base-range triad. This difference arises because all the terms in the base-range triad *are* legally available to the trial court based on the jury's verdict for the relevant offense, whereas enhancements are not. *Hernandez*, 46 Cal. 3d at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856. The failure to recognize this distinction was the flaw in the trial court's decision to impose an uncharged enhancement.

> [That analysis] fails to distinguish a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed. "Sentencing facts" such as aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available. They help the court select, for example, the higher, middle or lower term and whether terms should be consecutive or concurrent. Such factors are largely the articulation of considerations sentencing judges have always used in making these decisions.

Id. at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856.

2. The distinction between sentencing within the base range and imposing a term not provided for by the verdict is further reflected in California's application of its forfeiture rules. Under California law, most claims of

sentencing error are forfeited if the defendant failed to object at sentencing. However, a claim that the sentence imposed by the court was "legally unauthorized" is never forfeited, regardless of a failure to object. *People* v. *Scott*, 9 Cal. 4th 331, 353-54, 885 P.2d 1040, 1053-54, 36 Cal. Rptr. 2d 627, 640-41 (1994). A sentence is legally "'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case," such as "where the court violates mandatory provisions governing the length of confinement." *Id.* at 354, 885 P.2d at 1054, 36 Cal. Rptr. 2d at 641. By contrast, claims subject to forfeiture "involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." *Id.*

Notably, the trial court's failure to find aggravating factors to justify an upper term is error subject to forfeiture. *Scott*, 9 Cal. 4th at 353, 885 P.2d at 1053, 36 Cal. Rptr. 2d at 640 ("We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons."). This application of the forfeiture rule reflects that, even absent any aggravating factors, the upper term is not a "legally unauthorized" sentence. Rather, an upper term in the absence of such findings is an authorized sentence merely imposed in a "procedurally or factually flawed

manner." *Id.* at 353-54, 885 P.2d at 1053-54, 36 Cal. Rptr. 2d at 640-41.[7]

California habeas corpus law also reflects the distinction. A defendant may challenge an unauthorized sentence by way of a collateral attack on the judgment. See, *e.g.*, *In re Harris*, 49 Cal. 3d 131, 134 n.2, 775 P.2d 1057, 1059 n.2, 260 Cal. Rptr. 288, 290 n.2 (1989) ("Habeas corpus will lie when the trial court 'exceeded its jurisdiction by sentencing a defendant "to a term in excess of the maximum provided by law," or to correct a misinterpretation of [a] statute resulting in confinement "in excess of the time allowed by law". . . .'" (citation omitted)); *People* v. *Miller*, 6 Cal. App. 4th 873, 877, 8 Cal. Rptr. 2d 193, 195 (1992) ("A writ of habeas corpus 'will always issue to review an invalid sentence, when, without the redetermination of any facts, the judgment may be corrected to accord with the proper determination of the circumstances.'"). However, a collateral challenge does not lie to compel findings of aggravating factors for an upper term sentence. See *People* v. *Olken*, 125 Cal. App. 3d 1064, 1067-68, 178 Cal. Rptr. 497, 499 (1981) ("The sentence itself was authorized by law. Consequently, the court did not exceed its jurisdiction in imposing it. In sum, a failure to comply with the duty to articulate a reason or reasons for a sentence choice does not render a final judgment susceptible to collateral attack.").

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[7] A footnote in *Scott* stated that an upper or lower term was a "departure" from the midterm. *Scott*, 9 Cal. 4th at 350 n.13, 885 P.2d at 1051 n.13, 36 Cal. Rptr. 2d at 638 n.13. But that word was used prior to *Apprendi* or *Blakely*, and thus without an appreciation that it might take on special significance. This footnote dictum does not undercut the principle derived from the body of the opinion that all three terms of the base range are legally available based on the verdict alone.

Black, *Hernandez*, and *Scott* make clear that California legally authorizes its trial judges to select any of the three terms in the crime-specific base range, including the upper term, based on the jury verdict alone. Thus, the defendant cannot be said to have "a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely*, 542 U.S. at 309; see also *United States* v. *Booker*, 543 U.S. at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

3. This point also distinguishes the upper term sentence at issue here from the exceptional sentence invalidated in *Blakely*. Under Washington law, the trial court was not legally authorized to depart from the standard range of forty-nine to fifty-three months without additional factual findings. *Blakely*, 542 U.S. at 304-05 (noting Blakely's departure term "involved a sentence greater than what state law authorized on the basis of the verdict alone"); see also *id.* at 305 ("[I]t remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority [to depart from the standard range] only upon finding some additional fact."); *Booker*, 543 U.S. at 232 ("We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for Class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence."). By contrast, California law makes the upper term a component of the "standard range," not a departure from it, and the trial court *is* legally authorized under state law to impose the upper

term based on the jury verdict alone. Consequently, petitioner's sentence, at the upper term of the base range, is not comparable to the departure sentence found unconstitutional in *Blakely*.

4. Not only did California anticipate *Apprendi* and *Blakely* by internalizing the Sixth Amendment rule into its sentencing system, California's determinate sentencing law avoids the policy concerns animating that jurisprudence. *Booker* explained that the driving force behind those decisions was the need to check the growing "trend of legislative regulation of sentencing" in which legislatures selected facts to be determined by a judge at sentencing "that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." *Booker*, 543 U.S. at 236; see also *id.* at 237 ("[T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances."). This new trend in sentencing upset the historic balance between the role of the jury in circumscribing the defendant's culpability through the verdict on the charged offense and the role of the judge in setting punishment commensurate with that culpability. "The effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury." *Id.* at 236. "As the enhancements became greater, the jury's finding of the underlying crime became less significant." *Id.* The Court acted to prevent the usurpation of the jury's function through the device of shifting elemental facts into judge-determined enhancements.

> The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between

> the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

Id.

California's determinate sentencing law does not represent judicial usurpation of the jury's role. While in 1977 California shifted from indeterminate terms to legislative identification of facts that enhance punishments beyond the base range or that enhance the applicable base range itself, the State never diminished the role of the jury. To the contrary, California's determinate sentencing law jealously safeguarded the role of the jury by mandating that *any* fact that supports an increase above the base range—as by enhancements and alternate sentencing schemes—be pleaded and proved to the jury beyond a reasonable doubt. *Black*, 35 Cal. 4th at 1257, 113 P.3d at 545, 29 Cal. Rptr. 3d at 752-53. Unlike the systems criticized in *Apprendi*, *Blakely*, and *Booker*, California's system maintains the traditional role of the jury in circumscribing the scope of criminal culpability by restricting the trial court to a selection of the most appropriate term among the three terms of the relevant base range for the crime found by the jury. Unlike this within-the-base-range factfinding, all other factfinding increases a defendant's sentence above the statutory maximum, either through

enhancements or alternative sentencing schemes, and is reserved for the jury.[8]

5. Another concern underlying *Apprendi* and *Blakely* is that systems which eliminate the jury's role in assessing facts used to enhance a sentence above the crime-specific base range weaken the historic link between crime and punishment by failing to provide notice or any degree of certainty as to what punishment could be expected for committing the underlying offense. See *Apprendi*, 530 U.S. at 478 ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime."). This concern does not infect California's sentencing system either. A California defendant has full notice that he or she risks the upper term sentence for any given felony because the upper term is one of the three possible terms of the base range that appears either in the very code section or set of code sections that enumerate the elements of the offense or in the catch-all triad in California Penal Code section 18. For example, California Penal Code section 288.5 expressly provides that anyone committing petitioner's offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." A defendant in California can "discern from the statute of indictment what maximum punishment conviction under that statute could bring." *Apprendi*, 530 U.S. at 483 n.10. Unlike the

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[8] California also allocates to the trial court a limited number of additional factfinding responsibilities in making discretionary choices which are not implicated by the instant case. See, *e.g.*, Cal. Penal Code §§ 17 (court may reduce a "wobbler" offense from a felony to a misdemeanor), 1203 (decision to stay sentence and order probation), 1169 (decision to impose concurrent or consecutive sentences), 1202.4 (amount of restitution fine).

systems criticized in *Apprendi* and *Blakely*, in which a defendant "with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon" at sentencing, *Blakely*, 542 U.S. at 311, the upper term *never* constitutes an unheralded increase in a defendant's sentence in California.

California's sentencing system fully satisfies this Court's Sixth Amendment jurisprudence. Any fact necessary to impose an enhancement or sentencing scheme that increases the sentence beyond the maximum of the base range must be charged, presented to the jury, and found true beyond a reasonable doubt. By contrast, the sentencing considerations at issue in this case fall within the class of facts the trial court looks to in exercising its discretion to select a term within the base-range triad. These considerations are properly classified as permissible "sentencing factors," *Apprendi*, 530 U.S. at 494 n.19, which constitutionally may be found by the judge to select a term within the legislatively prescribed base range for the offense based on the verdict alone, *id.*; *Williams* v. *New York*, 337 U.S. at 246.

D. California Penal Code Section 1170(b), Which Functions As A Reasonableness Constraint On The Trial Court's Decision To Impose The Upper Term, Does Not Render The Upper Term Legally Unavailable Based On The Verdict Alone

Petitioner counters that section 1170(b) makes the midterm the presumptive term, and requires additional findings to deviate from that term. He views section 1170(b) as mandating a two-step sentencing procedure whereby the trial court starts with the midterm and moves up or down from that term based on additional findings of facts either in aggravation or mitigation. On this basis,

petitioner claims that only the midterm sentence is legally available to the trial court based on the jury verdict alone. Pet'r Br. 18-20.

1. Petitioner's attempt to equate section 1170(b) with the statutory provisions in *Blakely* is unavailing. Section 1170(b) differs fundamentally from Washington's statutory provisions. Washington's scheme identified a general ten-year maximum for a broad range of felonies, then applied separate statutory provisions describing an alternative lower "standard range" based on various factors, which for Blakely resulted in an offense-specific standard range of forty-nine months to fifty-three months. *Blakely*, 542 U.S. at 299. Section 1170(b) neither sets out a separate "standard range," nor creates a lower offense-specific alternative that supplants the triad range specifically linked to each offense in California.

2. Moreover, section 1170(b) nowhere limits the trial court's *authority* to impose an upper term. The fallacy in petitioner's argument is that his cramped interpretation of section 1170(b) conflicts with the broader construction given that statute by the California Supreme Court. As *Black* made clear, the trial court is legally authorized to select any of the three terms based on the verdict alone. Section 1170(b) is not a threshold factfinding requirement, but rather is a reasonableness constraint on the trial court's ultimate sentencing decision.

Indeed, petitioner's claim reflects a fundamentally flawed view of the sentencing process in California. That process does not begin at a presumptive midpoint with judicial findings required to deviate upwards or downwards. Instead, the trial court always has all three sentencing options available to it and selects the appropriate one based on its consideration of all relevant criteria relating to the offense and offender. The process begins

with the court guided, not constrained, by the factors enumerated in the California Rules of Court, as well as by the probation officer's report, other relevant reports, statements by the victim and the defendant, and statements and arguments submitted by the parties. The court uses this information to conduct a quantitative and qualitative weighing of circumstances in aggravation and mitigation, to determine whether, on balance, the defendant's crime is typical, or more aggravated or mitigated. Only then, after evaluating and balancing the relevant circumstances, does the court decide which of the three terms to impose as appropriately reflecting the defendant's level of culpability. Cf. *People* v. *Stevens*, 205 Cal. App. 3d 1452, 1457, 253 Cal. Rptr. 173, 177 (1988) (rejecting an overly "rigid" view of the "mechanics of sentencing" and observing that the judge may take every factor into account in selecting an appropriate sentence, including his "subjective belief regarding the length of the sentence to be imposed," provided the court's evaluation "is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria"); see also *People* v. *Burbine*, 106 Cal. App. 4th 1250, 1260, 131 Cal. Rptr. 2d 628, 635 (2003) ("In selecting the middle term as the principal term at the initial sentencing, the trial court here did not, as appellant suggests, 'acquit' him of the upper term. It did no more than find that the totality of the circumstances justified the selection of that particular term.").

California courts reject efforts to transform sentencing decisions into a mechanical set of rules that curtail sentencing discretion.

> "Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty,

> treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender."

People v. *Savala*, 147 Cal. App. 3d 63, 69, 195 Cal. Rptr. 193, 196 (1983) (quoting *People* v. *Williams*, 30 Cal. 3d 470, 482, 637 P.2d 1029, 1035, 179 Cal. Rptr. 443, 449 (1981)).

California has rejected an interpretation of section 1170(b) as establishing the starting point for a court's sentencing decision. Rather, section 1170(b) is a constraint imposed *after* the court has considered all of the available information. The California Supreme Court reaffirmed in *Black* that section 1170(b)'s requirement establishes a "reasonableness" constraint on an otherwise available sentencing choice. *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751 ("Although [section 1170(b)] is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.").[9]

Section 1170(b) is a legislative recognition that to impose the statutory maximum—the most aggravated term possible in a base range—in the complete absence of identified factors or reasons justifying such a term, would

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[9] California Rule of Court 4.420(b) provides, "Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Given that section 1170(b) sets out a reasonableness constraint, the term "justified" in its implementing rule is properly understood as "reasonable" as opposed to "legally authorized." See Cal. Const., art. VI, § 6 (rules "shall not be inconsistent with statute").

be an abuse of discretion and necessarily unreasonable. This recognition flows from the fact that the choice among the three legislatively prescribed sentences is entirely discretionary. The court's sentencing decision may be based on *any* circumstance in aggravation or mitigation, whether or not specifically enumerated in the rules of court, and, apart from facts elemental to the crime already accounted for in the legislatively designated triad, may "include 'practically everything which has a legitimate bearing' on the matter in issue." *People* v. *Guevara*, 88 Cal. App. 3d at 93, 151 Cal. Rptr. at 516; see also *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751; Cal. R. Ct. 4.408(a). The court can rely on essentially any reason placing the defendant's particular offense outside the mean when selecting within the sentencing range. Conversely, if no such reason exists, it is unreasonable and an abuse of discretion for the trial court to choose the upper or, for that matter, the lower term.

3. Petitioner's focus on the labeling of California's midterm as a "presumptive term" is also misleading. State law recognizes the midterm as the usual or typical term for each species of offense to promote policy goals of eliminating sentencing disparity and facilitating uniformity of sentences. See Cal. Penal Code § 1170(a). The label "presumptive term" derives from the fact that, as the usual (or legislatively preferred) term, a court need not explain why it has selected that term, whereas it must explain its balancing process on the record for imposing an upper or lower term. See Cal. Penal Code § 1170(b) (no statement of reasons need be given when imposing the midterm). The procedure for selecting the midterm, however, remains the same as for the upper and lower terms of the triad. The trial court is required to evaluate

available materials and balance aggravating and mitigating factors. If, at the conclusion of the balancing process, the court determines the midterm is appropriate, it need not explain the selection of that term on the record in a statement of reasons. But the trial court's decision to impose the midterm remains subject to review for abuse of discretion. See, *e.g.*, *Cattaneo*, 217 Cal. App. 3d at 1587-88, 266 Cal. Rptr. at 716; *People* v. *Knowlden*, 171 Cal. App. 3d 1052, 1058-59, 217 Cal. Rptr. 758, 761 (1985).

> [Consequently,] even though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the "statutory maximum" for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . ."

Black, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. The California Supreme Court's interpretation of California statutory law is binding on this Court. *Ring* v. *Arizona*, 536 U.S. at 597-603; *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).

Petitioner retorts that *Black*'s discussion of the discretion available to the sentencing court invokes a rationale "repudiated" by this Court. Pet'r Br. 29. *Black*, he suggests, ignores this Court's statements that it makes no difference that "the judicially determined facts *require* a sentence enhancement or merely *allow* it, [if] the verdict alone does not authorize the sentence," and that it is "immaterial" that the trial court may rely on "*any* aggravating fact," if the court must still find a fact to gain the authority to impose a particular departure term. Pet'r Br. 27-29 (citing *Blakely*, 542 U.S. at 305 & n.8). True, the availability of discretion and the amount of discretion in the process of finding a *required* fact does not obviate the constitutional problem if that fact must be found *before* the court has legal authority to impose the departure sentence. However, the amount of discretion the court has in imposing a sentence that *is already* legally available, and how the court exercises that discretion, is very relevant when evaluating the *reasonableness* of the court's ultimate decision. It was in this latter context, not the former, that *Black* emphasized the amount and quality of the trial court's discretion.

Accordingly, under section 1170(b), all three statutorily enumerated sentencing choices are available to the judge based on the jury's verdict alone. Judicial factfinding in support of an exercise of discretion occurs *within* the available base range, not outside it.

E. *Booker* Establishes That A Reasonableness Constraint On The Trial Court's Ultimate Discretion To Select Punishments Within A Range Does Not Alter The Legal Availability Of The Terms Within The Range

What question remains is whether the reasonableness constraint of section 1170(b) renders the trial court's otherwise permissible factfinding unconstitutional. *United States* v. *Booker*, 543 U.S. 220, dictates that the answer to this question is no.

Booker fleshed out the Sixth Amendment jury trial analysis of *Apprendi* and *Blakely*. Under *Booker*, a threshold constraint on the court's sentencing authority triggers the Sixth Amendment jury-trial right. A reasonableness constraint on the court's ultimate sentencing decision does not. That distinction is what separates the reformed Federal Sentencing Guidelines from the mandatory Guidelines. It also distinguishes California's reasonableness constraint in section 1170(b) from the threshold factual requirements in Washington's exceptional sentence provision.

Booker held the Guidelines unconstitutional as measured against *Blakely*. *Booker* reaffirms, however, that a trial court properly may make discretionary determinations based on sentencing factors in selecting an appropriate term within a prescribed range. *Booker*, 543 U.S. at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); see also *id.* ("For when a trial judge exercises his discretion to

select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

The Guidelines as reformed in *Booker* are an exemplar of a sentencing scheme in which the court, not the jury, finds aggravating and mitigating circumstances without violating the Sixth Amendment. The sentencing court must consider but is not bound by the Guidelines. *Booker*, 543 U.S. at 259-64. But judicial factfinding is still fettered in this sense: the sentence must be "reasonable" in relation to all of the applicable factors in order to survive appellate review. *Id.* at 261-63. Under the reformed Guidelines, a district court is not free to impose the maximum term in the crime's range *irrespective* of the presence or absence of aggravating circumstances. Rather, any significant departure from the now-advisory Guidelines range must be reasonable in relation to the presence of aggravating factors set out in the Guidelines and in consideration of other statutory concerns set out in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 245-46, 261-63.

1. California's determinate sentence system complies with *Booker*'s constitutional structure

California sentencing law, as elucidated by *Black*, is consistent with the structure and scheme found constitutional in the remedial portion of *Booker*. Upon a defendant's conviction, all three terms of the base range are available sentencing choices. The court's exercise of discretion in selecting a term is guided by the California Rules of Court, which enumerate a nonexclusive, advisory list of aggravating and mitigating factors. And the court's decision, after considering all of the relevant criteria is reviewed for abuse of discretion, a reasonableness constraint on the court's ultimate sentencing decision. The

nature and quality of discretion accorded a California sentencing court is constitutionally equivalent to the discretion given a federal district court in selecting a term after consideration of the now-advisory Federal Sentencing Guidelines. For constitutional purposes, the constraints on a California court operate in essentially the same manner as those imposed under the advisory Guidelines. See *Booker*, 543 U.S. at 259 ("Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

Similarly, California's legislative preference for the midterm as the usual term does not violate the Constitution. *Booker* recognized the importance of respecting the legislature's role in identifying sentencing preferences that must be considered by the courts in order to achieve uniformity in sentencing. *Booker*, 543 U.S. at 249-56; see *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *8 (10th Cir. 2006) ("*Booker* does not place original sentencing decisions entirely in the discretion of trial judges; the Guidelines—as an expression of the political will of Congress—continue to assert advisory influence on those decisions. Similarly, *Booker* should not be interpreted to exempt appellate courts from the influence of Congress's sentiments about reasonableness in sentencing."). Indeed, the driving force behind *Booker*'s interpretation of the Guidelines was recognition of the need to preserve as much of the system as possible to ensure the statutory scheme would achieve Congress's desired goal of uniformity based on the defendant's real conduct. *Booker*, 543 U.S. at 250-51.

Ultimately, there is only one distinction between California's reasonableness constraint set out in section 1170(b) and that articulated in *Booker*. Section 1170(b)

embodies an explicit conclusion that imposing the statutory maximum in the absence of any justification always is unreasonable and an abuse of discretion, whereas that conclusion is implicit in *Booker*'s "review for unreasonable[ness]." This distinction is not constitutionally meaningful. Although *Booker* does not expressly spell out that a maximum term imposed absent any justification is necessarily unreasonable, this principle is nonetheless an implicit and integral part of *Booker*'s reformed Guidelines scheme. Accordingly, the fact that California does spell out this constraint in section 1170(b) does not render California's sentencing scheme unconstitutional.

2. *Booker*'s reasonableness review requirement effectively mandates a federal court not impose the statutory maximum sentence in the absence of any justification beyond the fact of the crime

The twin mandates of *Booker*—that the district court "must take account of" the sentencing Guidelines and policy considerations set out in 18 U.S.C. § 3553(a) in selecting a sentence and that the court's selection ultimately must be reasonable—lead inexorably to the same conclusion as that embodied in section 1170(b). The Guidelines are now advisory, but continue to inform and channel the district court's sentencing discretion. As a district court departs further from the advisory Guidelines range along the sentencing spectrum toward the statutory maximum, the court must provide justification to demonstrate why the defendant's real conduct falls outside the preferred sentence range for the crime. If the court points to no facts justifying the deviation from the legislatively preferred sentencing choices, the reasonableness of the court's decision to sentence above the Guidelines range progressively diminishes as the deviation increases. A

substantial deviation, *without any justification*, would inevitably be unreasonable. Although under the reformed Guidelines system it is unnecessary to identify at what point an upward variance, without any facts in support, becomes unreasonable, that point necessarily occurs below the statutory maximum, or else the reasonableness review constraint becomes meaningless. Cf. *Martin* v. *Franklin Capital Corp.*, ___ U.S. ___, 126 S. Ct. 704, 710 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."); see also *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U.S. 189, 196 n.8 (1995) ("[A]s is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand.").

Decisions of the federal circuit courts that have applied *Booker*'s reasonableness constraint generally reflect this conclusion. First, those courts have recognized that the Guidelines embody controlling policy determinations as to which sentencing levels constitute the appropriate degree of punishment for a defendant's real conduct in the vast majority of cases, to which policies the district courts must defer. A majority of the circuits have integrated such deference into their reasonableness analysis by adopting a "presumption of reasonableness" for sentences imposed within the advisory Guidelines range. See, *e.g.*, *United States* v. *Johnson*, 445 F.3d 339, 341 (4th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716, 717-18 (8th Cir. 2005); *United States* v. *Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); cf. *United States* v. *Talley*, 431 F.3d

784, 788 (11th Cir. 2005) (noting that sentences within the advisory guidelines "ordinarily" will be reasonable). But see *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006); *United States* v. *Zavala*, 443 F.3d 1165, 1168-70 (9th Cir. 2006) (rejecting a district court presumption of reasonableness). The remaining circuits have declined to apply a presumption of reasonableness to within-Guidelines sentences, but still give appropriate deference to the policy determinations inherent in the Guidelines by holding that the Guidelines serve as the starting point for the court's exercise of discretion in selecting an appropriate sentence. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 518-19 (explaining district court should first calculate Guidelines range as the starting point and then consider whether "other factors identified by either side warrant an ultimate sentence above or below the Guideline range"); *United States* v. *Mix*, 450 F.3d 375, 381 (9th Cir. 2006) (same).

Second, the circuit courts consistently use the Guidelines range as the yardstick for measuring the reasonableness of a district court's sentencing decision. Those circuit courts analyzing the reasonableness standard applied to non-Guidelines sentences have recognized that greater deviations from the Guidelines recommendations require concomitantly greater justification to survive review.

> Sentences deviating from the guideline range can be reasonable so long as the judge offers appropriate justification under the factors specified in Section 3553(a). The further the district court varies from the presumptively reasonable guideline range, the more compelling the justification based on the 3553(a) factors must be. An extraordinary

> reduction [or increase] must be supported by extraordinary circumstances.

United States v. *Bryant*, 446 F.3d 1317, 1319 (8th Cir. 2006) (citations omitted); see also *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed."); *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *9 (10th Cir. 2006) ("Because this case presents such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines, it should be considered reasonable only under dramatic facts."); *United States* v. *Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("Additionally, the district court must more thoroughly articulate its reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines. These reasons should be fact-specific and consistent with the sentencing factors enumerated in section 3553(a). The farther a sentence varies from the applicable Guideline sentence, 'the more compelling the justification based on factors in section 3553(a)' must be.") (citations omitted); *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006) (same, quoting *Dean*); *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (quoting *Dean*); cf. *United States* v. *Mix*, 450 F.3d at 381 (noting judge must "calculate the range accurately

and explain why (if the sentence lies outside it) this defendant deserves more or less").

The circuit courts' recognition that *Booker* ties the reasonableness of an aggravated sentence to the level of justification offered by the trial court demonstrates that *Booker*'s reasonableness constraint encompasses the concept found in section 1170(b). The linkage between reasonableness and justification necessarily implies that, at some point in the sentencing spectrum, an aggravated sentence imposed without any justification offered beyond the bare elements of the offense established by the jury verdict will be unreasonable. As the Eighth Circuit observed:

> [W]hen a decision is discretionary, "the court has a *range of choice*, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." [*Kern* v. *TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)] (emphasis added). We also made it clear that the range of choice is limited. *Id.* ("when we say that a decision is discretionary . . . we do not mean that the district court may do whatever pleases it"). Similarly, reasonableness as a constraint on a district court's discretion to depart downward infers a limited range of choice.

United States v. *Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) (first ellipses added); see also *United States* v. *Talley*, 431 F.3d at 788 ("In our evaluation of a sentence for reasonableness, we recognize that there is a range of reasonable sentences from which the district court may choose . . . .").

Booker's reasonableness constraint effectively creates a range of reasonable sentencing choices within the sentencing spectrum. *Booker*'s directive—that the district courts base their sentencing decisions on the policy goals set out by Congress in § 3553(a) and take into account the

Guidelines range—dictates a range of reasonable choices roughly proportionate to the Guidelines range. Applying these considerations, it would be unreasonable for a sentencing court to depart from the Guidelines and impose the statutory maximum based on the bare conviction alone. Unless sufficient justification is offered to expand the range of reasonable choices, a court's decision to impose the statutory maximum will be defective. Cf. *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *9 ("[W]e should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range."). Critically, however, such a sentence would not be *unauthorized*, but *unreasonable*. While the statutory maximum identified by Congress is always legally available based on the jury's verdict alone, it is not a *reasonable* sentence based on the verdict alone in the absence of sentencing factors justifying an aggravated term. To impose the statutory maximum for a run-of-the-mill offender without *any* additional justification will always be unreasonable.

3. Section 1170(b)'s reasonableness constraint is constitutionally equivalent to the reasonableness review requirement validated in *Booker*

The relevant features of California's sentencing system operate in much the same way as the reformed Guidelines system. California's system and the reformed Guidelines allow the court to find "sentencing factors" by a preponderance of the evidence. Compare Cal. R. Ct. 4.420(b) with *United States* v. *Grier*, 449 F.3d 558, 569-70 (3d Cir. 2006) (applying preponderance burden of proof for finding sentencing factors). But cf. *United States* v. *Staten*, 450 F.3d 384, 392-94 (9th Cir. 2006) (holding that, while

preponderance is the general level of proof, facts that give rise in an "extremely disproportionate" increase in sentence above the Guidelines range must be found by clear and convincing evidence). Both California courts and federal district courts must balance the applicable factors in exercising discretion and must state reasons on the record to support any aggravated sentence. Compare § 1170(b) and Cal. R. Ct. 4.420(b) with *United States* v. *Grier*, 449 F.3d at 574 ("The record must disclose meaningful consideration of the relevant statutory factors and the exercise of independent judgment, based on a weighing of those factors, in arriving at a final sentence."). Neither of these features raises constitutional concerns. *Apprendi*, *Blakely*, and *Booker* did not set out any new constitutional limitations on the burden of proof for appropriate judicial factfinding within the available base range. Cf. *United States* v. *Watts*, 519 U.S. 148, 155 (1997) (per curiam) (observing "that application of the preponderance standard at sentencing generally satisfies due process"); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986). The requirement that courts balance factors and state reasons for imposing an aggravated sentence within the applicable range provides the reviewing court with a record to evaluate whether the trial court employed the correct procedure in reaching its conclusion and if its sentencing decision was unreasonable.

The sentencing constraint imposed in section 1170(b) also operates essentially the same way as that imposed in *Booker*. California's reasonableness constraint provides that, although all three terms of the base range are legally available, imposing the statutory maximum in the absence of *any* justification would be unreasonable and an abuse of discretion. California's system, of course, differs from the reformed Guidelines system in that California's has a

single midterm, not a *range* of choices between the statutory maximum and statutory minimum covering a wide spectrum of sentencing choices. Consequently, the State's system does not give rise to a requirement that increasingly compelling reasons must be offered to justify progressively more severe sentences. Cf. *United States* v. *Dean*, 414 F.3d at 729. Under the advisory Guidelines the statutory maximum may be reasonable only when supported by *substantial* justification, but an upper term in California can be reasonable with a single aggravating factor. In California's system, the complete absence of any justification to support the statutory maximum or minimum leaves the midterm sentence as the only *reasonable* sentencing choice, and thus it has been labeled a "presumptive" term. That the midterm may be the only reasonable sentencing choice after all factors are taken into account, however, does not render the upper term legally unavailable as a sentence based on the jury verdict alone. Abuse of discretion or unreasonableness is determined at the end of the sentencing process; it is not a threshold evaluation that determines the availability of the sentencing options. Section 1170(b)'s reasonableness constraint does not render the upper term legally unavailable for *Apprendi* purposes, nor does it constitutionally preclude the trial court from conducting judicial factfinding to impose an upper term. California's system conforms to *Booker* and therefore does not violate *Blakely* and *Apprendi*.

4. Petitioner's upper term sentence is constitutional

California's determinate sentencing law satisfies the constitutional mandates of the Sixth and Fourteenth Amendments. Its crime-specific base ranges consisting of three terms place a defendant on notice of the punishment

for each offense. Petitioner himself was convicted of violating California Penal Code section 288.5, which expressly provides a base range of "6, 12, or 16 years." Because those terms were available based on the verdict alone, the upper term was the statutory maximum for Sixth Amendment purposes.

The trial court properly found facts to select the appropriate term from that offense-specific base range. It considered the probation and psychological evaluations, and the statements and arguments of the parties and witnesses. It evaluated factors in aggravation and mitigation that informed whether petitioner's crime was typical, extenuated, or worse than average. The court found, among other factors, that the crime involved threats of violence and an abuse of a position of trust. After balancing the factors and detailing the applicable sentencing objectives, the court concluded that petitioner's offense fell outside the norm for similar offenses and selected the upper term. Under section 1170(b), the ultimate base-term selection rested on the reasonableness of the sentence in light of all the pertinent circumstances. The court of appeal reviewed the trial court's decision for an abuse of discretion and, despite discounting some aggravating factors, found no abuse. The trial judge's factfinding to select a term from the legally available range was constitutional.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

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APPENDIX

1. California Penal Code section 288.5(a) provides:

> Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

2. California Penal Code section 1170(b) provides in relevant part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section

1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

3. California Rule of Court 4.408 provides:

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

4. California Rule of Court 4.409 provides:

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

5. California Rule of Court 4.410 provides:

(a) General objectives of sentencing include:

(1) Protecting society.

(2) Punishing the defendant.

(3) Encouraging the defendant to lead a law abiding life in the future and deterring him or her from future offenses.

(4) Deterring others from criminal conduct by demonstrating its consequences.

(5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration.

(6) Securing restitution for the victims of crime.

(7) Achieving uniformity in sentencing.

(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

6. California Rule of Court 4.420 provides:

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of

the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

7. California Rule of Court 4.421 provides:

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

8. California Rule of Court 4.423 provides:

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.